(2)

No. 93-1587

SUPREME COURT, U.S.
FILED
MAY 4 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ANN B. LOVELL, *et al.*,

Petitioners,

v.

PEOPLES HERITAGE SAVINGS BANK, *et al.*,

Respondents.

ANN B. LOVELL, *et al.*,

Petitioners,

v.

THE ONE BANCORP, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE S. ISAACSON
BRANN & ISAACSON
P.O. Box 3070
Lewiston, ME 04240
(207) 786-3566

PETER J. DETROY, III
NORMAN, HANSON & DE TROY
P.O. Box 4600 DTS
Portland, ME 04112
(207) 774-7000

CATHERINE R. CONNORS
(Counsel of Record)
RALPH I. LANCASTER, JR.
DANIEL M. SNOW
PIERCE, ATWOOD, SCRIBNER, ALLEN, SMITH & LANCASTER
One Monument Square
Portland, ME 04101
(207) 773-6411

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

I. The nature and value of the interest at issue .. 1

II. The notice provided to account holders 5

A. General public notices 6

B. Individualized notice 7

C. Informational meetings 8

D. The November 26, 1986 meeting 9

E. Plaintiffs' actual notice 9

ARGUMENT 10

I. Every Court Has Ruled Consistently with the Courts Below 10

A. The lack of a protectable property interest ... 10

B. The sufficiency of the notice and opportunity to be heard 13

II. The Circumstances of this Case Make it Particularly Inappropriate for Review by this Court 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Appeal of Concerned Corporators of the Portsmouth Savings Bank, 129 N.H. 183, 525 A.2d 671 (1987) 12

Bishop v. Wood, 426 U.S. 341 (1976) 4

Board of Regents v. Roth, 408 U.S. 564 (1972) 4

Dames & Moore v. Regan, 453 U.S. 654 (1981) 11

Foss v. Maine Turnpike Authority, 309 A.2d 339 (Me. 1973) 13

Fuentes v. Shevin, 407 U.S. 67 (1972) 14

Goldberg v. Philadelphia Savings Fund Society, 9 Phila. 456 (Pa.Ct.Comm.Pl. 1983) 11

Hafner v. Office of Thrift Supervision, 1992 U.S.App. Lexis 24778 (4th Cir. Sept. 28, 1992) (unpublished) 11

In re East New York Savings Bank Depositors Litigation, 145 Misc.2d 620, 547 N.Y.S.2d 497 (1989), *aff'd*, 162 A.D.2d 251, 559 N.Y.S.2d 125 (1990) 12

Lerman v. City of Portland, 675 F.Supp. 11 (D.Me. 1987), *aff'd*, 879 F.2d 852 (1st Cir.) (unpublished), *cert. denied*, 493 U.S. 894 (1989) 13

Lovell v. Peoples Heritage Savings Bank, 776 F.Supp. 578 (D.Me. 1991) 9, 12

Lovell v. The One Bancorp, 614 A.2d 56 (Me. 1992) .. 4, 12

Mathews v. Eldridge, 424 U.S. 319 (1976) 14

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 14

TABLE OF AUTHORITIES – Continued

Page

NTN Bearing Corp. of America v. United States, 757 F.Supp. 1425 (C.I.T. 1991), *aff'd without op.*, 972 F.2d 1355 (Fed. Cir. 1992) 14

O'Bannon v. Town Court Nursing Home, 447 U.S. 773 (1980) 14

Opp Cotton Mills v. Administrator of the Wage and Hour Division of the Department of Labor, 312 U.S. 126 (1941) 14

Ordower v. Office of Thrift Supervision, 999 F.2d 1183 (7th Cir. 1993) 11, 16

Paulsen v. Commissioner of Internal Revenue, 469 U.S. 131 (1985) 11

Society for Savings of Cleveland v. Bowers, 349 U.S. 143 (1955) 4, 11

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 14

Washington Federal Savings and Loan Association v. Federal Home Loan Bank Board, 526 F.Supp. 343 (N.D.Ohio 1981) 12

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 13

York v. Federal Home Loan Bank Board, 624 F.2d 495 (4th Cir.) 12

STATUTES, REGULATIONS AND RULES

4 M.R.S.A. § 57 4

5 M.R.S.A. § 11002 8

TABLE OF AUTHORITIES – Continued

Page

9-B M.R.S.A. § 344 ..... 2, 7, 9

9-B M.R.S.A. § 364 ..... 2, 3, 16

12 C.F.R. § 563b 2

M.R.Civ.P. 76B 4

Supreme Court Rule 15.1 1

Supreme Court Rule 29.1 1

F.R.Civ.P. 56 ..... 10, 15

STATEMENT OF THE CASE

Plaintiff-Petitioners have misstated or omitted facts bearing on the question of what issues would properly be before the Court were certiorari granted. Pursuant to Supreme Court Rule 15.1, Respondents[1] identify below Petitioners' material errors and omissions.

I. The nature and value of the interest at issue

Through their Questions Presented, Petitioners basically claim a violation of procedural due process. In support of this claim, they contend that, as account holders in a mutual savings bank, they held a protectable property interest that was eliminated when Peoples Heritage Savings Bank ("the Bank") converted to stock form. This eliminated interest is described in Petitioners' Statement of the Case as "the net worth" of the Bank, amounting to "approximately $78 million," or an average of "$500" for each depositor. (Petition, p. 7.)

---

[1] This Brief in Opposition is being filed on behalf of Defendant Peoples Heritage Savings Bank and its Defendant officers, Weston L. Bonney and Robert A. Marden ("the Peoples Heritage Bank Defendants"). The recitation of facts included in this Brief focus on the facts relevant to this case only, and not the companion case involving Maine Savings Bank.

Pursuant to Supreme Court Rule 29.1, the Peoples Heritage Bank Defendants state that Peoples Heritage Savings Bank is a subsidiary of Peoples Heritage Financial Group. Oxford Bank & Trust is an unincorporated division of Peoples Heritage Savings Bank. First Coastal Savings Bank, which does business in New Hampshire, is a subsidiary of Peoples Heritage Financial Group, and First National Bank of Portsmouth is a subsidiary of First Coastal Savings Bank. Only Peoples Heritage Financial Group is publicly traded.

Conversely, Petitioners describe the liquidation account established on behalf of the account holders as a part of the conversion as "nearly worthless." (*Id.*) Hence, they apparently claim that before the conversion, account holders owned something worth $78 million, and that after the conversion, they owned nothing.

These descriptions and claims are incorrect.

The substantive terms of the Bank's conversion plan complied with Maine law, 9-B M.R.S.A. § 344, and were essentially the same as those required by regulations of the Federal Home Loan Bank Board ("FHLBB") governing mutual to stock conversions of federally chartered institutions. *See* 12 C.F.R. § 563b. Consistent with these regulations, prior to the conversion, the account holders:

(1) owned their funds on account;

(2) were entitled to interest earnings on those funds; and

(3) had an inchoate interest in the Bank's surplus, if any, in the unlikely event of solvent liquidation, subject to the Maine Superior Court's approval under 9-B M.R.S.A. § 364(1) and (3).

After the conversion, the account holders:

(1) owned their same funds on account;

(2) were entitled to the same interest earnings on those funds; and

(3) had a right to share in the liquidation account in the unlikely event of a solvent liquidation, subject to the Maine Superior

Court's approval under 9-B M.R.S.A. § 364(1) and (3).[2]

Thus, the only interest belonging to the account holders even potentially affected by the conversion was their contingent interest in the surplus of the Bank (if any) should the Maine Bureau of Banking and federal bank regulators somehow permit the Bank to liquidate while solvent.

As a threshold matter, even this last contingent interest remained unaffected. Pursuant to 9-B M.R.S.A. § 364, even after the conversion, should the Bank somehow liquidate while solvent, the Maine Superior Court can still order a distribution of all or any surplus to account holders. Conversely, any interest the account holders had in a distribution of the surplus before the conversion was also limited by the Maine Superior Court's approval pursuant to Section 364.

Second, even if this contingent interest were somehow affected by the conversion despite Section 364, there was no evidence in the record that such a solvent liquidation would or could ever occur. (See the opinion of the First Circuit, found in the Petition at p. 2a.) Hence, under the facts as shown in this case, the contingent interest could not arise to a protected expectancy.

---

[2] Eligible account holders were also given first opportunity to buy stock in the converted bank, at a price equal to the fair market value of the stock, based upon an independent appraisal. Petitioners state that only 2-3% of the Bank's account holders purchased the conversion stock. (Petition, p. 11.) The record in fact indicates that 37% of the stock was bought during the subscription offering. There is no reference in the record to any 2-3% figure.

Third, as the First Circuit also observed (*id.*), the nature of this contingent interest is determined by state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also Bishop v. Wood*, 426 U.S. 341, 344 (1976). Here, the Maine Supreme Judicial Court ruled on the nature of the account holders' contingent interest in answers to certified questions transmitted by the District Court below pursuant to 4 M.R.S.A. § 57 and M.R.Civ.P. 76B. *Lovell v. The One Bancorp*, 614 A.2d 56 (Me. 1992). The Maine Court found that the account holders had no right under Maine law to a distribution to the surplus at the time of conversion, and described the contingent interest as "nebulous" and "hardly ris[ing] to the level of an expectancy." 614 A.2d at 66, citing *Society for Savings of Cleveland v. Bowers*, 349 U.S. 143, 150 (1955).

Fourth, nothing in the record indicates that the liquidation account was "worthless." Indeed, in its answers to the certified questions, the Maine Supreme Judicial Court found that the Maine Savings Bank liquidation account – which, unlike the Peoples Heritage account, terminated after ten years[3] – "adequately protected and preserved" the contingent interest. 614 A.2d at 67.

Fifth, Petitioners have incorrectly characterized the account holders' contingent interest in the surplus upon a solvent liquidation as the equivalent to the Bank's net worth at the time of the conversion. The source of Petitioners' $78 million figure is unclear. The number might be an inadmissible (see *infra* note 6) estimate of the book

---

[3] Petitioners' statement to the contrary (p. 8) is wrong. The lifespan of the Peoples Heritage liquidation account is unlimited.

net worth of the Bank at the time of the conversion, which did approach that amount (approximately $72 million, according to admissible documents in the record). That amount, however, whether $72 or $78 million, has no correlation to any surplus any account holder could receive in the unlikely event of a solvent liquidation. The *book* net worth of banks, particularly in the mid-1980's, would not reflect the *fair market* value of bank assets, such as long term loans; the actual value of mortgages held by banks at that time, for example, was far lower than their book value, given the disparity in the high interest rates existing at that time compared to the low rates at the time of execution of the notes.

Sixth and finally, as a result of the conversion, account holders benefitted from the increased capitalization of the Bank, protecting their tangible interests, *e.g.*, the funds in their accounts. Indeed, the whole purpose of the conversion was to increase the Bank's capitalization, in order to strengthen its financial situation.

In sum, the facts as contained in the record actually demonstrate that account holders, including Petitioners, not only lost nothing, but rather *gained* as a result of the conversion.

II. The notice provided to account holders

Even if the contingent interest did rise to the level of a protectable property interest, and even if the record could support a claim that account holders were somehow deprived of that interest, Petitioners' cause of action would fail unless they could prove that they did not receive a meaningful notice and opportunity to be heard

before the conversion took place. The actual holding of the First Circuit below was based on the conclusion that these procedural safeguards were met. In their Statement of the Case, Petitioners have mischaracterized the multiple notices and opportunities they received.

Prior to the conversion, which took place on December 11, 1986, account holders were given the following general and individualized notices and opportunities to be heard:

A. General public notices

1. a press release announcing that the Bank directors had approved of the conversion plan, reported in various Maine newspapers on August 27 and August 31, 1986;

2. legal notices of the Bank's intention to submit the conversion plan to the Maine Bureau of Banking, published in five Maine and New Hampshire newspapers on August 28, August 29, August 30 and September 9, 1986;

3. legal notices of the Bureau of Banking's acceptance of the Bank's application for conversion for processing, published two times, one week apart, in the same five newspapers. (The notice stated, among other things, that "[i]nterested parties may submit written comments on [the Bank's] application . . . and requests for hearing" through October 22, 1986);

4. after the Bureau of Banking's October 22, 1986 conditional approval of the application, announcements in Maine newspapers of the

approval, followed by legal notices of the Bureau's conditional order in the five newspapers; and

5. notices in various newspapers of informational meetings to be held in November 1986.

B. Individualized notice

Pursuant to 9-B M.R.S.A. § 344, the account holders had to vote their approval of any conversion by the Bank. After the Bureau's conditional approval of the conversion plan, but before the account holders voted, before the Bureau's final approval of the conversion, and before the conversion itself, the Bank mailed to each account holder (prior to October 29, 1986) a Notice of Special Meeting of Account Holders. In addition to the Notice, this individualized mailing included:

1. an Account Holder Information Statement;
2. a brochure entitled "Questions and Answers on Stock Conversion and Instructions for Completion of Subscription Order Form";
3. notice of the regional meetings to inform account holders about the conversion, with their dates and locations;
4. a ballot to vote on the plan and a business reply envelope;
5. a letter from the President of the Bank;
6. a subscription offering circular; and
7. a stock order form and a business reply envelope.

In a section of the Account Holder Information Statement captioned "Principal Effects of Conversion," the Statement noted that the conversion would not affect deposit accounts or loans; that the 500 corporators would be eliminated, with their voting rights passed on to the shareholders; and that a liquidation account would be established. The nature of the liquidation account was described.

In a section of the Statement captioned "Offering of Common Stock," the Bank explained the order of priority of the subscriptions, and how the stock was valued.

In a section of the Statement captioned "Judicial Review," the Bank, echoing the pertinent language of the Maine Administrative Procedure Act, 5 M.R.S.A. § 11002, explained the right and opportunity of any person believing himself or herself aggrieved by the agency's action to file a petition for review in the Maine Superior Court, and included the deadline for the appeal.[4]

C. Informational meetings

Following up on the general and individualized notice of regional meetings, meetings were held for account holders in twelve Maine counties from November 3 to November 13, 1986, to answer whatever questions they had about the conversion.

---

[4] Neither Petitioners nor any other account holder filed such an administrative appeal.

D. The November 26, 1986 meeting

As announced in the individualized notice, the Special Meeting to vote on the conversion took place on November 26, 1986. The account holders voted overwhelmingly to approve the conversion.[5]

E. Plaintiffs' actual notice

At the November 26, 1986 account holder meeting, the Plaintiffs Lovell voted against the Plan. Prior to the meeting, they obtained legal counsel and hand-delivered a letter from their counsel to the Bank stating their objections to the Plan and the conversion process and their belief that the conversion would effect a taking of their property.[6]

---

[5] A total of 3,701 account holders voted in person or by proxy at the meeting: 3199 in favor, 502 against. The remainder of the approximately 119,000 account holders, who neither appeared in person at the meeting nor returned the ballot sent to them in their individualized mailings, were deemed to have voted in favor of the conversion, as provided in 9-B M.R.S.A. § 344(3). The individualized mailing expressly notified the account holders of this presumption (in boldface). Petitioners are apparently complaining that this statutory presumption violates the due process clause. They are wrong. *Lovell v. Peoples Heritage Savings Bank*, 776 F.Supp. 578, 591-92 (D.Me. 1991).

[6] Petitioners claim (p. 9, n. 3) that there was "clear evidence" that the Bank consciously attempted to keep depositors uninformed, citing purported minutes of a Bank meeting. Aside from the fact that the Lovells' own actions belie this conclusion, these purported minutes (along with most of the other documents on which Petitioners rely) were inadmissible, as noted by the Defendants in their objections to Plaintiffs' Statement of Material Facts before the District Court and First Circuit. *See*

In sum, prior to the conversion, the account holders had multiple general notices of the conversion, individualized mailed notice describing the conversion and the liquidation account, regional meetings answering any account holder questions about the conversion, the Special Meeting voting on the conversion, and Petitioners in fact understood the impact of the conversion. Prior to the conversion, Petitioners could have filed comments with the Bureau of Banking, requested a hearing, and/or filed an administrative appeal. They pursued none of these opportunities.

ARGUMENT

I. Every Court Has Ruled Consistently with the Courts Below.

A. The lack of a protectable property interest

Aside from the First Circuit, District Court and Maine Supreme Judicial Court in this case, every other court confronting questions related to the issue whether an account holder in a mutual savings bank holds a constitutionally protectable property interest extinguished by a conversion has answered no.

For example, as noted by the Maine Supreme Judicial Court, this Court previously described the interest of a mutual savings bank depositor in a bank's undivided earnings as "hardly ris[ing] to the level of an expectancy."

F.R.Civ.P. 56(e). Because the courts below ruled in Defendants' favor, these objections were never reached.

Bowers, 349 U.S. at 150.[7] *See also Paulsen v. Commissioner of Internal Revenue*, 469 U.S. 131, 140-41 (1985) (describing account holders' equity interest in a mutual savings association as insubstantial and of "almost no value"). *See generally Dames & Moore v. Regan*, 453 U.S. 654, 674 n. 6 (1981) (finding unprotected a revocable, contingent and subordinate interest).

Lower courts are in agreement. *See Ordower v. Office of Thrift Supervision*, 999 F.2d 1183, 1187 (7th Cir. 1993) (depositor's interest in a mutual association is a "liquidation preference, not a transferable property right"); *Hafner v. Office of Thrift Supervision*, 1992 U.S.App. Lexis 24778 (4th Cir. Sept. 28, 1992) (unpublished) (account holders' interests in a mutual association "do not rise to the level of a protected property interest"); *Goldberg v.*

---

[7] This Court stated:

> The asserted interest of the depositors is in the surplus of the bank, which is primarily a reserve against losses and secondarily a repository of undivided earnings. So long as the bank remains solvent, depositors receive a return on this fund only as an element of the interest paid on their deposits. To maintain their intangible ownership interest, they must maintain their deposits. If a depositor withdraws from the bank, he receives only his deposits and interest. If he continues, his only chance of getting anything more would be in the unlikely event of a solvent liquidation, a possibility *that hardly rises to an expectancy. It stretches the imagination very far to attribute any real value to such a remote contingency,* and when coupled with the fact that it represents nothing which the depositor can readily transfer, *any theoretical value reduces almost to the vanishing point.*

Bowers, 349 U.S. at 150 (emphasis supplied).

Philadelphia Savings Fund Society, 9 Phila. 456, 465 (Pa.Ct.Comm.Pl. 1983) ("plaintiffs do not possess a constitutionally cognizable property interest in the surplus or net worth of [the bank]".) *See also York v. Federal Home Loan Bank Board*, 624 F.2d 495, 499-500 (4th Cir.), *cert. denied*, 449 U.S. 1043 (1980); *Washington Federal Savings and Loan Association v. Federal Home Loan Bank Board*, 526 F.Supp. 343, 400 (N.D.Ohio 1981); *In re East New York Savings Bank Depositors Litigation*, 145 Misc.2d 620, 624, 547 N.Y.S.2d 497, 500 (1989), *aff'd*, 162 A.D.2d 251, 559 N.Y.S.2d 125 (1990).

The New Hampshire Supreme Court did reverse an order approving a conversion because the conversion plan failed to preserve account holders' charter rights to direct distribution of a surplus. *Appeal of Concerned Corporators of the Portsmouth Savings Bank*, 129 N.H. 183, 525 A.2d 671 (1987). As noted by the Maine Supreme Judicial Court, *Lovell*, 614 A.2d at 65, however, that decision is inapposite, because there, unlike here, the bank charter predated the state's reservation of power to alter or amend corporate charters; the Maine Supreme Court held that, under Maine law, account holders in mutual savings banks such as Peoples Heritage, chartered after the State's reservation, have no right to a direct distribution of the surplus. Even with this distinguishing factor, moreover, then-New Hampshire Supreme Court Justice David Souter dissented. *Portsmouth Savings Bank*, 525 A.2d at 701-02 (calling account holders' interest in the bank's surplus a "technical fiction," and any distribution to them a "windfall").

B. The sufficiency of the notice and opportunity to be heard

Even if the contingent interest did arise to a protected expectancy, no court has found that the type of notice and opportunities to be heard given here insufficient under the federal due process clause.[8]

Petitioners' complaint appears two-fold: (1) Defendants did not give account holders individualized notice until after the Bureau of Banking gave the Bank conditional approval to convert; and (2) all of the notices, general and individualized, failed sufficiently to underscore to the account holders how the conversion would affect their contingent interest in the surplus.

On the second point, as both the District Court and First Circuit noted, the account holders were "entitled to accurate, informative notice, not to [Petitioners'] particular characterizations of the information being disseminated." (Petition, 3a.) The notices explained the establishment of the liquidation account and the rights of the new shareholders, and told the account holders of

---

[8] Plaintiffs may also be pursuing their takings and contract right claims. These claims fail not only because of the lack of a protectable interest, but due to multiple other deficiencies. For example, the takings claim is not ripe because Plaintiffs failed to pursue their state court avenue for relief. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985); *Lerman v. City of Portland*, 675 F.Supp. 11, 15-16 (D.Me. 1987), *aff'd*, 879 F.2d 852 (1st Cir.) (unpublished), *cert. denied*, 493 U.S. 894 (1989); *Foss v. Maine Turnpike Authority*, 309 A.2d 339, 344 (Me. 1973). *See generally* the District Court's opinions below (Petition, pp. 17a-25a, 43a.)

their opportunities to submit comments, seek a re-hearing and pursue an administrative claim. Petitioners' own conduct demonstrated that they understood the impact of the conversion long before expiration of their opportunity to pursue administrative avenues of relief.

On the first point, as a threshold matter, given the at-best conjectural nature of the interest at issue and the 119,000 member size of the class of account holders, *no* individualized notice was constitutionally required at any point. *See Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988); *O'Bannon v. Town Court Nursing Home*, 447 U.S. 773, 800-01 (1980) (Blackmun, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

Additionally, the Constitution requires notice and opportunity to be heard only before the deprivation takes place, not before conditional rulings on the propriety of the alleged deprivation. *See Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) ("before the deprivation at issue takes effect"). *See also Opp Cotton Mills v. Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 152-53 (1941) ("The demands of due process do not require a hearing at the initial stage or at any particular point . . . in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective"); *NTN Bearing Corp. of America v. United States*, 757 F.Supp. 1425, 1433 (C.I.T. 1991), *aff'd without op.*, 972 F.2d 1355 (Fed. Cir. 1992) (notice prior to final, not preliminary, determination relevant to due process analysis).

Finally, viewing all the notices in the context of the three-factor test discussed in *Mathews v. Eldridge*, 424 U.S.

319, 334-35 (1976), these notices meet that test under the particular circumstances of this case.

II. The Circumstances of this Case Make it Particularly Inappropriate for Review by this Court.

If, despite the universal agreement of the courts below, this Court were looking for an appropriate case to review the issue whether an account holder in a mutual savings bank holds a protectable property interest extinguished upon conversion, this is not the right case for multiple reasons.

First, the actual holding of the First Circuit was not on this issue but rather on the sufficiency of the notice and opportunity given to Petitioners to be heard. This determination required a review of the 150 pages of individualized materials mailed to the account holders, plus the multiple other notices described above, viewed in the context of the particular circumstances of this conversion. This Court's conclusion as to the sufficiency of the notices would thus not have universal application outside the specific facts of this case. Here, moreover, Petitioners had actual notice, knew their rights, and failed to pursue their administrative claims.

Second, due to Petitioners' failure to comply with F.R.Civ.P. 56, the materials they submitted in opposition to Defendants' motion for summary judgment were inadmissible. The evidentiary predicate for a proper review of the issues listed by Petitioners, is therefore, muddled at best.

Third, not only were the materials submitted by Petitioners inadmissible, they supplied no evidence on material elements of their claims. For example, the First Circuit stated that one deficiency in Petitioners' presentation was their failure to produce "trial-worthy proof that the contingency – a solvent liquidation – would ever occur." (Petition, p. 2a.)

Fourth, the existence of 9-B M.R.S.A. § 364, and the Bank's agreement at the time of the conversion that the Bureau of Banking had (and still has) the power to order a distribution of the surplus to the account holders upon a solvent liquidation, eliminates the basis of Petitioners' claim. It at least makes their claim premature. Unless or until a solvent liquidation takes place and the Bureau of Banking does not order a distribution of surplus to account holders, not even the deprivation as alleged can occur.

Fifth and finally, a preliminary issue raised in this case is whether the conversion involved the state action necessary for a constitutional claim. Defendants originally moved for summary judgment on this basis, which was denied. Because summary judgment was granted on alternate grounds by both the District Court and the First Circuit, the issue was not reached on appeal. Logically, it does not make sense to analyze the constitutionality of the actions at issue here, when no constitutional right may even have been implicated due to the private nature of the conduct. *See Ordower*, 999 F.2d at 1187 (conversion did not implicate Constitution because a "regulator's failure to prohibit a privately initiated and implemented transaction does not violate the Constitution").

CONCLUSION

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinions of both courts below and the Maine Supreme Judicial Court, the Petition should be denied.

Respectfully submitted,

CATHERINE R. CONNORS
(Counsel of Record)
RALPH I. LANCASTER, JR.
DANIEL M. SNOW
PIERCE, ATWOOD, SCRIBNER,
ALLEN, SMITH & LANCASTER
One Monument Square
Portland, ME 04101
(207) 773-6411

GEORGE S. ISAACSON
BRANN & ISAACSON
95 Park Street
P.O. Box 3070
Lewiston, ME 04240
(207) 786-3566

PETER J. DETROY, III
NORMAN, HANSON &
DE TROY
415 Congress Street
P.O. Box 4600 DTS
Portland, ME 04112
(207) 774-7000

Counsel for Respondents
Peoples Heritage Savings Bank,
Weston L. Bonney and
Robert A. Marden